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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 675

HENRY E. BECKER,
Petitioner,

vs.

ROBERT C. SOLOMON, TRUSTEE, ETC.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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STATEMENT.

Standard Coal Mining & Converters Corporation was organized under the laws of the State of Illinois, for the purpose of engaging in the coal mining business. (T. 18.) In the Fall of 1946, it engaged in another venture. It solicited and received cash deposits of approximately $350,000 for the sale of steel. No steel was delivered and the money was not refunded. Nothing was received for the money so advanced by these creditors. (T. 20.)

On May 10, 1947, it was adjudicated a bankrupt by the District Court of the United States, for the Southern Dis-

trict of Illinois, Southern Division, upon an involuntary petition in bankruptcy.

The Trustee after a detailed investigation and examination of the officers of the Bankrupt, filed a petition against Ralph M. Brock, President, and Henry E. Becker, Vice-President of the Company, directors, and principal shareholders who controlled and dominated its affairs and under whose supervision and direction the funds were withdrawn, to account for and turn over to him various moneys withdrawn by them from the Bankrupt Corporation. (T. 8-17.) The Respondents filed their answers to the petition. (T. 18.) The answers are not incorporated in the Record. Extended hearings were had before the Referee at which Respondents were present with their counsel. (T. 18.).

On August 31, 1948, the Referee entered an order (T. 18), wherein he found:

> "During the period from January 1, 1947, to May 10, 1947, checks in sums varying from $1,000.00 to $10,000.00 aggregating over $200,000.00 payable to said Ralph M. Brock, Henry E. Becker, or Cash, were drawn on the Company Bank Account at the City National Bank and cash obtained thereon by the said Ralph M. Brock, Henry E. Becker, or W. W. Blankenship.
>
> The Respondent, Ralph M. Brock, testified in this proceeding as to some of the cash received by him as aforesaid; Henry E. Becker, appeared in person in Court, at the hearing but offered no evidence in opposition to that of the Trustee with reference to said withdrawals. The Court finds that the cash withdrawals of funds from said City National Bank of Chicago, and South East National Bank, the Respondent, Ralph M. Brock has offered no explanation as to the following:
>
> Listing certain exhibits and amounts aggregating $17,500.00 showing withdrawals of $7,300.00 on May 9, 1947, the date of the service of notice of the application for appointment of Receiver, and $6,200.00 two days previously thereto, on May 7, 1947. (T. 21.)

That the Respondent, Henry E. Becker, caused the transfer to himself of funds of the Corporation and has offered no explanation to checks as follows:

Listing Exhibits and amounts aggregating $19,-500.00. All of said cash having been extracted within four months of the filing of the petition in Bankruptcy. (T. 22.)

The Court further finds that said Respondents, Ralph M. Brock and Henry E. Becker, offered no testimony in opposition to the evidence of the Trustee to show that said money was not in their possession at the time of the filing of the petition in bankruptcy, or remains in their possession.

That the said funds above set forth were at the time of the filing of the petition in bankruptcy herein and remain in the possession or under control of said Respondents." (T. 22.)

The order of the Referee required Respondents to turn over the money within ten days after service upon them of a copy of the order. (T. 24.) Respondents' attorney had notice of the order at the time of its entry, but the Trustee was unable to locate Respondents to make personal service of the order until December 20, 1948. (T. 5.)

Respondents failed to comply with the order of the Referee (T. 26, 27), whereupon he certified Respondents to the District Judge for Contempt. (T. 28, 29.)

The Certificate of the Referee to have Respondents held in contempt for their failure to comply with the order of August 31, 1948, came on for hearing before the Honorable Charles G. Briggle on March 28, 1949. (T. 30.) No written answer was filed by Respondents to the Referee's Certificate, but Respondents were present and represented by counsel. (T. 30.) Respondents attempted to purge themselves of the contempt, contending they were unable to comply with the Court's order.

The testimony of Petitioner, Becker, was evasive and incredible. (T. 52-61.) It disclosed that he was financially able to comply with the turn over order. At the time of the contempt order, Becker owned a home in Evanston, Illinois, title to which was in his wife's name. (T. 53.) The District Judge interrogated Becker as to the source of the money to purchase this property but received evasive replies. (T. 59.) In addition, he owns four (4) parcels of improved real estate at Carlinville, Illinois, tenanted by a tavern, ice cream shop, barber shop, fruit shop, etc., (T. 53, 54), and also "a lot of patents" issued by the Federal Government and are "secrets and cannot be disclosed." (T. 55.)

No evidence was offered by Becker to show that any disposition was made by him of the specific money that the Referee found was in his possession on August 31, 1948. He was afforded full opportunity to do so.

The Court found:

> "I am convinced beyond reasonable doubt each of these Defendants has knowingly and wilfully failed to comply with a proper order of the Referee as disclosed in this proceeding, and that they are guilty of Contempt of Court by reason of their failure to respond to this Order." (T. 65.)

The District Court on March 29, 1949, committed Petitioner to the custody of the Attorney General for confinement in jail until he shall purge himself of his Contempt unless he shall sooner be discharged by due process of law. (T. 68, 69.)

The Petitioners, Becker and Brock, prosecuted a joint appeal from the Order to the United States Circuit Court of Appeals for the Seventh Circuit.

Petitioner was released from custody on bail on May 7, 1949.

The Circuit Court of Appeals affirmed the Order of the District Court. Brock filed his separate Petition for a Writ of Certiorari in this Court as Case No. 614. This Petition raised substantially the same questions as are set forth in the present Petition of Becker.

PROPOSITIONS OF LAW RELIED UPON.

1.

The decision of the Circuit Court of Appeals is not in conflict but in accord with the decision of this Honorable Court in *Maggio* v. *Zeitz*, 333 U. S. 56.

2.

The sole Specification of Error relied upon by Petitioner (p. 5 of his Petition) is that the Circuit Court of Appeals failed and refused "to permit Becker to introduce such proof as he might have in support of his contention that the funds covered by the turnover order were no longer in his possession or under his control."

This statement is refuted by the opinion of the Court of Appeals which specifically affords him such opportunity. Transcript of Record page 88.

3.

The Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty and property without due process of law has no application. Petitioner was afforded a full hearing upon an issue made by a Petition filed by the Trustee in Bankruptcy and his answer thereto and was represented by eminent and able counsel. The Constitutional prohibition does not take away the power of a Court to commit to jail for contempt.

4.

The Eighth Amendment of the Constitution which forbids cruel and unusual punishment has no application. The Court found that Petitioner willfully refused to comply

with a lawful order of the Court. The record amply supports the finding of the Court and that he possessed property showing ability to comply with the Order. The decision of the Court of Appeals affords him further opportunity to prove inability to comply. If Petitioner does not show his inability to comply with the turnover order, he does not meet the issue.

Maggio v. *Zeitz,* 333 U. S. 56 at pp. 75, 76 (and cases there cited).

5.

Due regard should be given to the Trial Court to judge the credibility of the witnesses and his findings of fact should not be set aside unless clearly erroneous.

Rule 52 (a), Federal Rules of Civil Procedure.

6.

Courts have inherent power to compel obedience to a lawful judicial order by imprisonment for contempt.

Maggio v. *Zeitz,* 333 U. S. 56.

7.

Where the Bankrupt asserts his inability to comply with the turnover order and the Trial Court finds that the denials are incredible in context, the commitment for contempt should be sustained.

Maggio v. *Zeitz,* 333 U. S. 56.

8.

The burden of showing inability to comply with the turnover order was upon Petitioner, a fiduciary.

Maggio v. *Zeitz,* 333 U. S. 56.

Wylie v. *Bushnell,* 277 Ill. 484, 506, 507.

Nonnast v. *Northern Trust Co.,* 374 Ill. 248, 261.

ARGUMENT.

The Trustee in Bankruptcy on behalf of the creditors who were cheated and defrauded of upwards of $350,000, and all other creditors of said Estate, opposes the Petition. There are no special or important reasons specified in the Petition as are required by Rule 38 (5) of this Court.

The Petition is based upon the contention that the decision of the Circuit Court of Appeals is in conflict with the opinion of this Court in *Maggio* v. *Zeitz,* 333 U. S. 56.

The decision of the Circuit Court of Appeals is in full accord with the opinion of this Court in the *Maggio* case. This Court in the *Maggio* case said (333 U. S. at p. 75):

> "the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession."

This Court further held in the *Maggio* case that the Bankrupt did not meet this issue "by his own denials which the Court finds incredible in context."

The Circuit Court of Appeals with respect to the testimony of Petitioner states:

> "In many respects their testimony was vague, uncertain and unsatisfactory, especially as to the exact nature and amount of assets formerly owned by each of them. The trial Judge had the opportunity to observe appellants upon the witness stand and we must accept his judgment as to their credibility. The Court

announced he was convinced beyond a reasonable doubt that Brock and Becker knowingly and wilfully failed to comply with the Referee's turn-over order. He made findings that on August 31, 1948, the date of the turn-over order, * * * Becker had in his possession $19,500. of funds belonging to the bankrupt." (T. 86.)

The Court further stated:

"Under the state of the record, as we find it before us, sufficient evidence sustains the trial court's finding, and we must affirm its judgment, but that does not mean that Brock and Becker must necessarily spend the rest of their days in jail if they are never able to comply with the turn-over order. We have progressed considerably from the time when imprisonment for debt was commonplace. After a reasonable interval has elapsed, Brock and Becker may again seek to show the court their inability to comply with the turn-over order. *Maggio* v. *Zeitz, supra,* p. 72. On such a hearing, they should be prepared to make definite and accurate answers as to what was done with the assets formerly owned by the bankrupt and transferred to them, as well as their own assets." (T. 86.)

Under the decision of the Circuit Court of Appeals, Petitioner is afforded a full opportunity to show by credible evidence that he is unable to comply with the turn-over order. The Court further said:

"If the funds withdrawn from the bank accounts of the bankrupt are still intact and in the possession of or obtainable by the appellants, the court would be justified in keeping them in jail until they complied with the turn-over order. However, if proof can be made that said funds are in truth no longer available, this fact would have an important relation to appellants' present ability to comply with the turn-over order, and determine whether the terms of the order of commitment for contempt that each appellant be committed to jail 'until he shall purge himself of his said contempt' should be modified, or the commitment va-

> cated, and Brock and Becker released. But until such time, the order shall stand and it is hereby AFFIRMED." (T. 88.)

The rules of law laid down in the opinion of the Circuit Court of Appeals are based upon and in accord with the principles asserted by this Court in the *Maggio* case.

No explanation was made by Petitioner as to what disposition he made of the funds which he wrongfully appropriated immediately preceding the filing of the petition in bankruptcy and which were in *custodia legis,* and should have been turned over to the Receiver. To merely state he does not have the funds does not end the controversy.

Rule 52 (a) of the Federal Rules of Civil Procedure provides among other things:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the trial court to judge of the credibility of the witnesses."

To no type of case is this last clause more appropriately applicable than to the one herein, where the evidence of Petitioner is evasive and incredible, deliberately staged to conceal his present holdings and property and to give the false impression that the money withdrawn from the bank was dissipated and is not now in his possession.

No "presumption" need be indulged in and no resort to "fiction" is required to visualize that on the day the Receiver was appointed the Petitioner had in his possession $19,500.00 which belonged to, and was the property of the Receiver, and should have been turned over to the Receiver.

No explanation has ever been given as to the whereabouts of said funds or what was done with said funds except the bald statement that they are not in his possession.

He had ample opportunity to show his inability to comply with the turn-over order. No showing was made.

The Circuit Court of Appeals has afforded Petitioner the opportunity to show his inability to comply with the turn-over order. Petitioner, however, has chosen to conduct a series of extensive and expensive hearings and defenses in his efforts to avoid an accounting of the funds wrongfully withdrawn by him.

Imprisonment to compel obedience to a lawful judicial order has not yet ceased, and ought not to cease. To hold otherwise would destroy all respect for the Courts by stripping them of power to enforce their lawful decrees. Such power is inherent in all Courts.

The findings of the Referee, affirmed by the learned Judge, discrediting the excuses offered, and affirmed by the Circuit Court of Appeals require the acceptance by this Court of the conclusions reached by the Referee, the Judge, and the Circuit Court of Appeals.

The grounds presented in support of the Petition are clearly without merit and the Petition should be denied.

Respectfully submitted,

HARRY J. MYERSON and
LESLIE G. PEFFERLE,
Attorneys for Respondent, Robert C. Solomon, Trustee, etc.